FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 418

A. B. HALE, AS CHAIRMAN, AND E. A. McCOLSKEY ET AL., ETC.,

Appellants,

vs.

BIMCO TRADING, INC., AND BROWARD COUNTY PORT AUTHORITY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

MOTION FOR LEAVE TO SUPPLEMENT RECORD AND SUPPLEMENTAL RECORD.

MARTIN H. LONG,
Counsel for Appellee Bimco Trading, Inc.
R. S. SAUNDERS,
Counsel for Appellee Broward County Port Authority.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 418

A. B. HALE, AS CHAIRMAN, AND E. A. McCOLSKEY ET AL., ETC.,

Appellants,

vs.

BIMCO TRADING, INC., AND BROWARD COUNTY PORT AUTHORITY.

Appellees,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

MOTION FOR LEAVE TO SUPPLEMENT RECORD.

Come now the appellees in the above entitled cause and move the court for leave to supplement the record herein by adding thereto certified copies of certain proceedings in the Supreme Court of the State of Florida, in the case of *State ex rel., Florida Portland Cement Company* v. *A. B. Hale et al.*, to-wit:

1. Orders denying petitions of R. R. Saunders and Dwight Rogers as Counsel for Broward County Port Authority, of Philip D. Beall as Counsel for Pensacola Chamber of Com-

merce, and of Willard Utley as Counsel for Port of Palm Beach District for leave to file a petition for rehearing and to appear as *amici curiæ* in the above styled cause.

2. Petition of Willard Utley for leave to file petition for rehearing and to appear as *amici curiæ*.

3. Petition of the respondents for a rehearing filed November 1, 1937.

4. Præcipe for withdrawal of respondents' petition for rehearing.

5. Order allowing such withdrawal of petition for rehearing.

6. Peremptory writ of mandamus issued in the cause.

7. Motion for stay order filed in said cause December 2, 1937.

8. Order granting said motion for stay order.

Certified copies of said papers under the hand and seal of the Clerk and the Chief Justice of the Supreme Court of Florida have been filed in this Court. The original return herein, on pages 36 and 37 shows that certain matters were undisposed of at the time that portion of the record was filed in the lower court, which was on the 9th day of November, 1937. The order denying the petition for leave to appear as *amicus curiæ* and the order granting the withdrawal of the petition for rehearing filed by the respondents herein, was made on the 12th day of November, 1937. The peremptory writ of mandamus was issued November 19, 1937, and the motion to stay the order until this Court should decide the constitutionality of this Act, was filed on the 2nd day of December, 1937, and on the 9th day of December, 1937, an order was entered staying all proceedings under the peremptory writ until final decision of the Supreme Court

of the United States upon the constitutionality of the Act involved in this case, and until further order of the court.

WHEREFORE APPELLEES MOVE THE COURT for leave to file this motion and for printing those additions to the record in the Supreme Court of Florida.

MARTIN H. LONG,
Solicitor for Bimco Trading, Inc.
R. R. SAUNDERS,
Solicitor for Broward Co. Port Authority.

UNITED STATES OF AMERICA,
State of Florida,
County of Duval:

Martin H. Long being first duly sworn, deposes and says that he dictated the foregoing motion; that he has read the same; that he knows the contents thereof, and that the matters and things therein alleged are true.

MARTIN H. LONG.

Subscribed and sworn to before me this 9th day of January, A. D. 1939.

CLAIRE McCORMICK,
[SEAL.] *Notary Public, State of Florida at large.*

My commission expires Aug. 21, 1942.

IN SUPREME COURT OF FLORIDA.

JUNE TERM, A. D. 1938.

ORIGINAL JURISDICTION MANDAMUS.

STATE OF FLORIDA *ex rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator*,

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents*.

CLERK'S CERTIFICATE.

I, G. T. Whitfield, Clerk of the Supreme Court of Florida, do hereby certify that the papers attached hereto consisting of

1. Orders denying petitions of R. R. Saunders and Dwight Rogers as Counsel for Broward County Port Authority, of Philip D. Beall as Counsel for Pensacola Chamber of Commerce and of Willard Utley as Counsel for Port of Palm Beach District for leave to file a Petition for Rehearing and to appear as *amici curiæ* in the above styled cause.

2. Petition of Willard Utley for leave to file Petition for Rehearing and to appear as *amici curiæ*.

3. Petition of the Respondents for a rehearing filed November 1, 1937.

4. Præcipe for withdrawal of Respondents' Petition for Rehearing.

5. Order allowing such withdrawal of Petition for Rehearing.

6. Peremptory Writ of Mandamus issued in the cause.

7. Motion for Stay Order filed in said cause December 2, 1937.

8. Order granting said Motion for Stay Order.

together with the papers appearing on pages 17 and 35, both inclusive, of the record of the Supreme Court of the United States, October Term, 1938, No. 418, wherein A. B. Hale, as Chairman, and E. A. McColskey *et al.*, etc., are appellants, and Bimco Trading, Inc., and Broward County Port Authority, are appellees, constitute the complete and entire record of the said cause lately pending in the Supreme Court of the State of Florida.

And I do further certify that the papers hereto attached are the true and correct copies of the originals, as the same are on file in my said office as Clerk of the Supreme Court of the State of Florida.

Witness my hand as Clerk, and the seal of the Supreme Court of the State of Florida at Tallahassee, Florida, on this 4th day of January, A. D., 1939.

G. T. WHITFIELD,
[SEAL.] *Clerk of the Supreme Court of Florida.*

IN THE SUPREME COURT OF FLORIDA.

JUNE TERM, A. D. 1937.

Friday, November 12, A. D. 1937.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator*,

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents*.

ORIGINAL JURISDICTION MANDAMUS.

Counsel for Respondents having filed a petition for rehearing in this cause, but having thereafter filed a Request for Leave to Withdraw the said Petition for Rehearing, it is ordered by the Court that Respondents be and they are hereby allowed to withdraw the said Petition in this cause.

And Counsel for the Chamber of Commerce of Pensacola, Florida, having asked the Court by petition for leave to appear as amicus in this cause and having in said petition submitted grounds upon which it is contended that a Rehearing should be granted, which Petition has been duly considered, it is thereupon ordered and adjudged by the Court that the said Petition of the Chamber of Commerce of Pensacola be and it is hereby denied.

And Counsel for the Broward County Port Authority having filed a similar petition for leave to appear as amicus and seeking a Rehearing in this cause and this Petition having been duly considered, it is ordered and adjudged by the Court that the said Petition for Rehearing be and it is hereby denied.

A true copy. Test:

____ ____,
Clerk Supreme Court of Florida.

IN THE SUPREME COURT OF THE STATE OF FLORIDA.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator,*

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents.*

To the Honorable Justices of the Supreme Court of the State of Florida:

Comes now Willard Utley, a member of the Bar of this Court, on behalf of and in the instance and request of the Port of Palm Beach District, in Palm Beach County, a public corporation of the State of Florida, and respectfully prays the Court for permission to file a Petition for a rehearing in said cause to appear as amicus curiae in the above

entitled cause, a petition for rehearing having heretofore been filed by the Respondents herein by delivering the same to the Judges of this Honorable Court, and shows to the Court as follows, to-wit:

1. That the Port of Palm Beach District is a public corporation created by an Act of the Legislature of the State of Florida, is pecuniarily and economically interested in the outcome of this legislation and the question raised by the pleadings in said cause.

That manifest and manifold discriminations will result to the Port of Palm Beach District and to the merchants and tax payers of the Port of Palm Beach District by the imposition of the tax designated as an inspection fee and will also affect the contractors and the builders in said District by increasing the purchase price of cement by at least Three ($3.00) Dollars a ton and shall otherwise be a detriment to the citizens and businesses of said community and said Port District.

Your Petitioner further shows that heretofore the Court has rendered a decision in this cause but your Petitioner, as amicus curiae and as representing the interests of the Port of Palm Beach District and the tax payers in said District respectfully shows to the Court in the judgment rendered it over-looked or failed to consider pertinent and vital matters in harmony with the position taken by the Respondents in their brief and their argument before your Honorable Court.

2. In holding that said Act does not violate the Commerce Clause of the Federal Constitution (Article 1, Sec. 8), this Court overlooked and failed to consider that this Act does not require any inspection of or levy any inspection fee upon any cement manufactured and sold and used in the State of Florida, or imported into Florida from any other State of the United States. But said Act only provides for the inspection and payment of fees with respect to cement imported into the State of Florida from a foreign country. And this Court also overlooked and failed to consider that the Supreme Court of the United States has held in *Voight* v. *Wright*, 141 U. S. 68, 35 L. Ed. 638, and other cases, that a State may not under the guise of exercising its police

powers or of enacting inspection laws, discriminate against the products and industries of some of the States in favor of the products and industries of its own and other States, and that a Statute that prevents products of distant States from coming into competition upon terms of equality with products of a domestic State, is repugnant to the Constitution of the United States. That any local regulation which in terms or by its necessary operation denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and therefore void.

This Court further overlooked and failed to consider that the Federal Constitution grants the Congress of the United States the power to regulate commerce with foreign nations in precisely the same language as it does commerce among the States. That if a State Statute, injuriously discriminating against the products of another State of the Union is forbidden by the Constitution, *then a similar State Statute discriminating against goods imported from a foreign Country is equally forbidden. Cook* v. *Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015.

3. This Court further overlooked or failed to consider that this Act before the Court nowhere provides for any inspection of cement manufactured, in Florida or anywhere else in the United States. The portion of said Act providing for a minimum standard for all cement offered for sale or sold or used in Florida, and its provision that it shall be unlawful to sell or offer for sale or use in Florida any cement which does not measure up to said minimum standard, makes *no provision whatever for inspection* of such cement. Furthermore, *it provides for no levy of any inspection fee whatever upon such cement.* This Court further overlooked and failed to consider that the foregoing minimum standard provisions of said Act, as far as they go, *apply with equal force and effect to cement imported into Florida from a foreign country.* But the further provisions in said Act for the inspection and license fees affecting cement imported from a foreign country into Florida, *do not apply with equal force and*

effect, or apply at all, to cement manufactured in Florida or imported into Florida from any other State in the United States. Therefore, the Court has overlooked and failed to realize that said Act lays a burden on cement imported into the State from a foreign country that is not laid upon cement manufactured in Florida or imported from any State of the Union, and that such a discriminatory burden violates said section of the Federal Constitution.

4. This Court in citing in its opinion *Voight* v. *Wright*, 141 U. S. 68, 35 L. Ed. 638, and *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862, misunderstood and overlooked the sole ground upon which said cases were decided by the United States Supreme Court. This Court cited said cases in support of the proposition that a State may not levy an inspection fee as a revenue measure.

This Court therefore overlooked that the Statute involved in *Voight* v. *Wright* laid no inspection fee for revenue. But on the contrary, the fee was laid entirely for inspection purposes. The sole isue raised and decided by the United States Supreme Court in that case was that since the Statute required the inspection *only* of flour imported into the State of Virginia, and did not require similar inspection of flour manufactured domestically, it constituted a burden on commerce, contrary to the Federal Constitution.

Furthermore, *Brimmer* v. *Rebman*, also cited in this Court's opinion, established and applied the same, identical principle. And this Court overlooked and failed to consider, for aught its opinion shows, the application of said principle and rule to the case at bar.

Therefore, Petitioner prays that this Petition be filed and prays the Court for ten (10) days time in which to file the brief in said cause for the information and convenience of the Court.

Respectfully submitted,

(Signed) WILLARD UTLEY.

IN THE SUPREME COURT OF FLORIDA.

JUNE TERM, A. D. 1937.

Friday, November 19, 1937.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator*,

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents*.

ORIGINAL JURISDICTION MANDAMUS.

Counsel for Port of Palm Beach District having moved the Court for permission to file a Petition for Rehearing in this cause which motion has been duly considered, it is thereupon ordered by the Court that the said motion be and it is hereby denied.

A true copy. Test:

____ ____,

Clerk Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator*,

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents*.

PRAECIPE FOR WITHDRAWAL OF RESPONDENTS' PETITION FOR REHEARING

Come now Respondents in the above styled cause by their undersigned Attorney and withdraw their petition for re-

hearing in the above styled cause, this First Day of November, A. D. 1937.

Respectfully submitted,

(Signed) RICHARD P. DANIEL,
Attorney for Respondents.

IN THE SUPREME COURT OF THE STATE OF FLORIDA.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator,*

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents.*

PEREMPTORY MANDAMUS.

State of Florida to A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and Constituting the State Road Department of the State of Florida:

Whereas, the Supreme Court of the State of Florida did heretofore issue alternative writ in the above styled cause, directed to the above named respondents, requiring the said respondents, as and constituting the State Road Department of the State of Florida, to show cause if any they could, why peremptory writ of mandamus should not issue as prayed in the petition filed by the relator; and the said respondents having failed to show any sufficient reason or cause why peremptory writ of mandamus should not issue as prayed in the petition of file in the above cause, this is, therefore, to command you, A. B. Hale, as Chairman, E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of the State of Florida, to inspect all cement im-

ported into the State of Florida from any foreign country and sold, offered for sale, or to be used in the State of Florida, and affix thereto evidence showing that said cement has been so inspected, and collect therefor the inspection fees fixed by an Act of Legislature passed at the 1937 session and as the same is on file with the Secretary of State, and which Act is copied in full in the opinion of this court overruling and denying motion to quash.

Witness the Honorable W. H. Ellis, Chief Justice of the Supreme Court of the State of Florida, and the seal of said Court this November 19, 1937.

(Signed) G. T. WHITFIELD,
[SUPREME COURT SEAL.] *Clerk.*

IN THE SUPREME COURT OF THE STATE OF FLORIDA.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator,*

VS.

A. B. HALE, as Chairman, and E. A. MCCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents.*

PETITION FOR REHEARING.

Filed November 1, 1937.

Richard P. Daniel, Attorney for Respondents; Daniel & Thompson, of Counsel.

Come now the above named Respondents, and respectfully petition the Court to grant a rehearing and reargument of the above cause.

As grounds for this petition it is respectfully urged that this Court in its judgment has overlooked or failed to consider pertinent and vital matters in harmony with the posi-

tion taken by these Respondents in their brief and oral argument as follows:

1. In holding that said Act does not violate the Commerce Clause of the Federal Constitution (Article 1, Sec. 8), this Court overlooked and failed to consider that this Act does not require any inspection of or levy any inspection fee upon any cement manufactured and sold and used in the State of Florida, or imported into Florida from any other State of the United States. But said Act only provides for the inspection and payment of fees with respect to cement imported into the State of Florida from a foreign country. And this Court also overlooked and failed to consider that the Supreme Court of the United States has held in *Voight* v. *Wright*, 141 U. S. 68, 35 L. Ed. 638, and other cases, that a State may not under the guise of exercising its police powers or of enacting inspection laws, discriminate against the products and industries of some of the States in favor of the products and industries of its own and other States, and that a Statute that prevents products of distant States from coming into competition upon terms of equality with products of a domestic State, is repugnant to the Constitution of the United States. That any local regulation which in terms or by its necessary operation denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and therefore void.

This Court further overlooked and failed to consider that the Federal Constitution grants the Congress of the United States the power to regulate commerce with foreign nations in precisely the same language as it does commerce among the States. That if a State Statute, injuriously discriminating against the products of another State of the Union is forbidden by the Constitution, *then a similar State Statute discriminating against goods imported from a foreign Country is equally forbidden. Cook* v. *Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015.

2. This Court further overlooked or failed to consider that this Act before the Court nowhere provides for any inspection of cement manufactured in Florida or anywhere

in the United States. The portion of said Act providing for a minimum standard for all cement offered for sale or sold or used in Florida, and its provision that it shall be unlawful to sell or offer for sale or use in Florida any cement which does not measure up to said minimum standard, makes *no provision whatever for inspection* of such cement. Furthermore, *it provides for no levy of any inspection fee whatever upon such cement.* This Court further overlooked and failed to consider that the foregoing minimum standard provisions of said Act, as far as they go, *apply with equal force and effect to cement imported into Florida from a foreign country.* But the further provisions in said Act for the inspection and license fees affecting cement imported from a foreign country into Florida, *do not apply with equal force and effect, or apply at all, to cement manufactured in Florida or imported into Florida from any other State in the United States.* Therefore, the Court has overlooked and failed to realize that said Act lays a burden on cement imported into the State from a foreign country that is not laid upon cement manufactured in Florida or imported from any State of the Union, and that such a discriminatory burden violates said section of the Federal Constitution.

3. This Court in citing in its opinion *Voight* v. *Wright*, 141 U. S. 68, 35 L. Ed. 638, and *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862, misunderstood and overlooked the sole ground upon which said cases were decided by the United States Supreme Court. This Court cited said cases in support of the proposition that a State may not levy an inspection fee as a revenue measure.

This Court therefore overlooked that the Statute involved in *Voight* v. *Wright* laid no inspection fee for revenue. But on the contrary, the fee was laid entirely for inspection purposes. The sole issue raised and decided by the United States Supreme Court in that case was that since the Statute required the inspection *only* of flour imported into the State of Virginia, and did not require similar inspection of flour manufactured domestically, it constituted a burden on commerce, contrary to the Federal Constitution.

Furthermore, *Brimmer* v. *Rebman*, also cited in this Court's opinion, established and applied the same, identical

principle. And this Court overlooked and failed to consider, for aught its opinion shows, the application of said principle and rule to the case at bar.

Respectfully submitted,

____ ____,

Attorney for Respondents.

____ ____,

Of Counsel.

IN THE SUPREME COURT OF FLORIDA.

JUNE TERM, A. D. 1937.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator,*

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents.*

MOTION FOR STAY ORDER.

Come now the above Respondents, constituting the State Road Department of Florida, and represent to the Court that since the peremptory writ of mandamus was entered by this Court in this cause, ordering these Respondents to enforce the provisions of Senate Bill 760, Laws of Florida, Acts of 1937, that an interlocutory injunction has been entered by the District Court of the United States for the Northern District of Florida, composed of three judges, pursuant to Section 266 of the United States Judicial Code, in a certain cause therein pending, wherein Bimco Trading Inc., is Plaintiff, and these Respondents are Defendants, restraining these Respondents from enforcing the provisions of said Act until the further order of said United States District Court.

These Respondents further represent that they intend to appeal from the said order of the said United States District Court to he Supreme Court of the United States,

and to obtain a decision from said last named Court as to whether said Act violates any of the provisions of the Constitution of the United States.

Your Respondents further represent that it is apparent that it is impracticable and impossible for them to obey both the order of this Court and of the United States Court, and therefore, they move this Court for an order staying further proceedings and action herein, until the final decision of the Supreme Court of the United States upon the constitutionality of said Act, or until the further order of this Court.

(Signed) RICHARD P. DANIEL,
Attorneys for State Road Department.

Receipt of a copy of the foregoing motion received this 2nd day of December, 1937.

(Signed) PAT WHITAKER,
Attorney for Relator.

IN THE SUPREME COURT OF FLORIDA.

JUNE TERM, A. D. 1937.

Thursday, December 9, A. D. 1937.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator,*

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents.*

ORIGINAL JURISDICTION MANDAMUS.

This cause having been submitted to the Court upon the motion of the Attorneys for the State Road Department for a Stay Order pending the appeal of the subject matter herein involved, to the United States Supreme Court in which its motion has been duly considered, it is thereupon ordered and adjudged by the Court that the said motion

be granted and that all further proceedings and actions taken pursuant to the peremptory Writ of Mandamus heretofore issued in this cause, be and the same is hereby stayed until the final decision of the Supreme Court of the United States upon the constitutionality of the act involved in this cause and until the further order of this Court.

A true copy. Test:

____ ____,

Clerk Supreme Court of Florida.

IN SUPREME COURT OF FLORIDA.

JUNE TERM, A. D. 1938.

STATE OF FLORIDA,
County of Leon, ss:

I, Glenn Terrell, Chief Justice of the Supreme Court of Florida do hereby certify that G. T. Whitfield, is Clerk of said Supreme Court of the State of Florida and that he is the custodian of and has in his possession all papers, documents and records filed in all cases and proceedings pending before said Court.

In Testimony Whereof, I have hereunto subscribed my name and caused to be affixed the seal of said Supreme Court at the City of Tallahassee, in said county and state, this 9th day of January, A. D. 1939.

GLENN TERRELL,
Chief Justice of the Supreme Court of the State of Florida.